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Supreme Court of the United States

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR,

Appellee.

REPLY BRIEF OF APPELLANTS, THE GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY.

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REPLY BRIEF OF APPELLANTS

Appellee cites cases based upon a State's reserved right and power to alter, amend or repeal corporation charters and relies upon cases relating to police regulations or requirements.

The Statutes in question do not fall under either of said classifications.

In *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; 343 344, this Court held:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, * * *"

The decision of the Supreme Court of Georgia, in the case at bar, construes the statute in question as an exercise of the taxing power under which assessments must be based on equivalent benefits.

The Supreme Court of Georgia held:

> "The power of determining the benefits to be received by the property of the railroad company from local improvements is a legislative one; and *in this case*, by virtue of its charter as amended, this authority is vested solely in the city commissioners, who in the exercise of said authority determine the same." (Italics ours.)
>
> (Printed Record, Page 140.)
>
> "There arises, from the Legislative Act of the City in adopting the ordinance for the paving and making the assessment, a presumption that the paving was beneficial to the street railway company."
>
> (Printed Record, Page 143.)
>
> "The city authorities in causing the paving and making the assessment may well have considered *in determining the benefits to be derived therefrom*, the value of the whole property, and not merely the value of one branch of the service." (Italics ours.)
>
> (Printed Record, Page 144.)
>
> (See also cases and authorities cited by appellants in their brief, Pages 22–23.)

RESERVED POWER OF STATE TO AMEND OR REPEAL CHARTER NOT INVOLVED

Although the Supreme Court of Georgia construed the acts in question as being under the classification of an exercise of the taxing power, which must be based upon equivalent benefits, appellee, in its brief, contends that the entire lack of benefits is immaterial because of "the reserved power to alter or amend charters."

(Appellee's Brief, Pages 3–7.)

The legislative acts in question were neither an amendment nor an attempted amendment to appellants' charters:

(a) The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 18, (Code Section 6446), provides: "General assembly shall have no power to grant corporate powers and privileges to private companies * * *. All corporate powers and privileges to * * * railroad * * companies shall be issued and granted by the Secretary of State in such manner as shall be prescribed by law; and if in any event, the Secretary of State shall be disqualified to act in any case, then in that event the legislature shall provide by general laws by what person such charters shall be granted."

Any amendment to or change in appellants' charter must be made by the Secretary of State under general laws.

(b) The Constitution of the State of Georgia, Art. 1, Sec. 4, Par. 1 (Code Section 6391), provides: "No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby * * *."

In *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683, 697, 698, this court held:

"The clause in that act (referring to a State's reserved power of amendment or repeal) declaring that 'no alteration or amendment to the charter of the gas company shall be made without the consent of the city counsel and the directors of the gas company,' plainly expresses as we think, the intention that the company's charter should not be amended or repealed "at the will of the legislature"."

The charters of appellants could not be changed, modified or affected by the special local acts in question.

(c) The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 8 (Code Section 6437), provides: "No law or ordinance shall pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof."

The Constitution of the State of Georgia, Art. 3, Sec. 7, Par. 17 (Code Section 6445), provides:

"* * the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made."

The charters of appellants were not referred to either in the title or body of the acts in question.

Cases dealing with the reserved right of the State to amend or repeal corporate charters by enacting general laws are not applicable to the statutes in question for they were not and could not be construed as an amendment or alteration of any of appellants' charters.

CASES DEALING WITH POLICE POWER AND REGULATION ARE NOT APPLICABLE

(a) The acts in question are an exercise of the taxing power; assessments thereunder to be based upon special benefits to particular property.

(b) They are revenue acts and not regulatory acts.

(c) They do not require property owners or street railway companies to construct or make any improvements.

(d) The statutes authorize the commissioners of the municipality (City of Decatur) "to grade, regrade; pave, repave; build, rebuild, or otherwise improve or reimprove any of the streets," etc.

(e) The acts are revenue acts authorizing the city to make improvements and raise funds for the improvements it makes.

(f) The assessments are made a general lien upon property from the time of the passage of the assessment ordinance.

(g) The city clerk is authorized to issue an execution for the amount of the special assessment.

(h) The execution is to be levied "as in the case of sale of realty for city taxes."

(i) The lien for this special tax is given priority next to the lien for general taxes.

In *City of Brunswick v. Gordon Realty Co.*, 163 Georgia 636; 641, the Supreme Court of Georgia held:

> "As the issuance of an execution creates a lien under which the municipal authorities may seize and sell the property improved, it follows further that in doing these acts, that is, in issuing the execution, seizing and selling under it, the municipality exercises the taxing power."

(j) The acts in question are not based upon any claimed police power or authority vested in the municipality. They provide that it is "additional and cumulative to other provisions now in force and in effect in said city."

Moreover, in the case at bar, the Supreme Court, in repeatedly holding that the power of determining the benefits to be received by the railroad companies for the local improvements in question is a legislative one, and that in determining the benefits the city authorities could consider the value of all of the property of appellants, classified the statutes in question as an exercise of the taxing power and not as a police regulation or requirement.

Special attention is called to the case of *United Rwys. & Elec. Co. v. Mayor of Baltimore*, 127 Md. 660; 96 Atl. 880. In that case the exact questions here involved were considered and decided as contended herein by appellants.

CASE AT BAR IS NOT "JUST ANOTHER OFFER ON THEIR (APPELLANTS) PART TO REPUDIATE THEIR CONTRACT"

The assertion made on Page 11 of appellee's brief—"The offer of appellants to surrender their franchise for this particular line and to abandon its operation is just another effort on their part to repudiate their contract,"—is erroneous.

Prior to the passage of the improvement ordinance in question, appellants, in good faith, notified appellee that they and their property would receive no benefits from the contemplated improvement; that the contemplated assessment "would vastly exceed the entire value of the street railway lines located and being operated within the territorial limits of the municipality, taking into consideration all improvements which would or could in any way result from the street paved. As evidentiary of this fact, appellants offered to surrender to the municipality *all* of its street railway lines and franchises located within the municipality of Decatur.

(See Record, Pages 23 and 24.)

When appellee brought suit against appellants to collect the amount of the assessment, appellee pleaded that it could not levy on street railway lines and property in Decatur without special legislative authority. In answer to such allegation appellants tendered appellee the "street railway lines located in the territorial limits of Decatur, together with the franchises under which they were constructed and operated."

(See Record, Pages 23 and 24.)

In answer to the suit brought by appellee against appellants, appellants pleaded "that the special paving assessment sought to be assessed against each of said defendants unconstitutionally confiscates the property of said defendants, for that the cost of said special paving assessment is substantially in excess of any special benefits which have accrued or can accrue to any of said defendants or any of said defendants' property wherever located, and the special paving assessment in question so far exceeds any benefit of any kind or character which defendants, or defendants' property can receive from the paving, so as to make said special paving assessment unjust and confiscatory of the property of defendants in violation of the 14th amendment of the Constitution of the United States."

(Printed Record, Pages 30 and 33.)

To rebut the legislative presumption of benefits, and as evidentiary of the lack of benefits, appellants in their answer, made "a tender and a continuing tender of the entire street railway lines located within the territorial limits of Decatur."

> (Printed Record, Page 28. See Opinion of the Supreme Court of the State of Georgia, Printed Record Page 143.)

In addition to this, appellants offered evidence to establish an entire lack of benefits.

A tax assessment based on special benefits is arbitrary and unconstitutional when there is an entire lack of benefits.

(See Appellants' Brief, Pages 25, 26 and 29.)

In *Duncan v. St. Johns Levy & Drainage Dist.*, 69 Fed. (2d) 242 (3), 345 (3), the U. S. Circuit Court of Appeals, 8th Circuit, held:

> "Any attempt by taxing authorities to impose a burden without a compensating advantage is power arbitrarily exerted, 'amounts to confiscation and violates the due process provision of the Fourteenth Amendment.' Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392."

Respectfully submitted,

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